(10)

No. 87-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONER

BRUNO A. RISTAU
Counsel of Record
JOEL E. LEISING
KAPLAN RUSSIN & VECCHI
1215 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 887-0353

Attorneys for the Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1372

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

Both in the district court and in the court of appeals, respondents relied almost exclusively on the Alien Tort Statute as a jurisdictional predicate for their suits.[1] They urged that a literal reading of the

---

[1] In their statutory notices of suit delivered to the petitioner, both respondents advised the Argentine Minister of Foreign Affairs that "it is the position of plaintiff . . . that the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982)." Pet. App. 38a, 41a.

Statute provided a remedy in tort against the petitioner for the property damages occasioned by the attack on the HERCULES. In their brief, in this Court, respondents now contend for the first time that the Alien Tort Statute should be interpreted to provide to aliens an independent maritime remedy against foreign sovereigns for the unlawful taking of a prize (Resp.Br. at 18-26). If the Statute does not provide such a remedy, they argue in the alternative that the general admiralty and maritime jurisdiction of federal courts furnishes an established basis for the maintenance of their suits. They devote a major part of their brief to this new thesis (*id.* at 26-50), and several of respondents' *amici* support that view.[2]

Finally, respondents argue that jurisdiction against the petitioner will lie under the tort exception to sovereign immunity contained in the Foreign Sovereign Immunities Act ("FSIA"), because the claimed wrongful conduct of the petitioner occurred "in the United States." (*id.* at 50-54).

We address these contentions below. We shall not burden this reply with a repetition of our challenge to the court of appeals' holding that the Alien Tort Statute provides a basis, independent of the jurisdictional provisions of the FSIA, for tort suits against foreign states for violations of international law.[3]

---

[2] Brief *amicus curiae* by the Maritime Law Association at 12-14; Brief *amicus curiae* by the Republic of Liberia at 15-17.

[3] With respect to the historical antecedents of the Alien Tort Statute we respectfully refer the Court to a recent scholarly article by Anne-Marie Burley of the Harvard Law School, submitted for publication in the American Journal of International Law, entitled *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*. Petitioner has lodged copies of the article with the Clerk of the Court and has furnished copies to the respondents and *amici*.

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT PREEMPTS THE DISTRICT COURTS' JURISDICTION IN ADMIRALTY, MARITIME AND PRIZE CASES

A. The Alien Tort Statute Does Not Provide Aliens with a Special Admiralty Remedy

Respondents' contention that the Alien Tort clause contained in Section 9 of the First Judiciary Act, 1 Stat. 77, was designed to provide to aliens an independent maritime remedy against foreign sovereigns for violations of international law is based on a series of disoriented premises:

1. In Oliver Ellsworth's handwritten notes of an early draft of what became section 9 of the First Judiciary Act, the Alien Tort clause immediately followed the clause which conferred on the district courts original and exclusive jurisdiction in admiralty and maritime cases (Resp.Br. at 19).[4]

2. In 1789, torts in violation of the law of nations consisted mainly of prizes captured at sea by privateers or by public armed ships, and the Alien Tort Statute was meant to assure to aliens a forum for improper captures at sea (*ibid.*).

---

[4] As enacted, Section 9 separated the clause conferring original and exclusive admiralty and maritime jurisdiction on the newly-established district courts from the Alien Tort clause. Congress inserted between these two provisions a clause conferring exclusive jurisdiction on district courts over all seizures on land and non-navigable waters and of all suits for penalties and forfeitures incurred under the laws of the United States. 1 Stat. 77.

3. Blackstone's *Commentaries* stated that an improper capture of a prize is civilly actionable (Resp.Br. at 20).

4. Blackstone listed as the three principal offenses against the law of nations violations of safe conduct, infringement of the rights of ambassadors, and piracy (*ibid.*).

Based on these premises, respondents urge that petitioner's "unjustified attack on a neutral vessel on the high seas, after notice of its route of innocent passage" constituted a violation of an implied safe conduct against the law of nations as that law had developed in 1789. They add that "since only sovereigns possessed navies and commissioned privateers, they must have been regarded as logical defendants under the Alien Tort Statute" (*id.* at 21).

Elsewhere, respondents suggest that the petitioner has committed an act of piracy—another of the offenses listed by Blackstone—because petitioner has failed to compensate the respondents for their claimed losses (*ibid.*).

None of these premises support respondents' conclusion that the 200-year old Alien Tort Statute was designed to provide aliens an *in personam* admiralty remedy against foreign sovereigns for claimed violations of the law of nations—the remedy which respondents seek here.

First, section 9 of the First Judiciary Act conferred exclusive, original jurisdiction "of all civil causes of admiralty and maritime jurisdiction" on the district courts, whereas the district courts' jurisdiction under the Alien Tort Statute was concurrent with that of the state courts. It does not appear logical that Con-

gress would in one clause confer exclusive original jurisdiction on the federal courts in *all* admiralty and maritime matters, and two sentences later confer concurrent jurisdiction on state courts in *some* admiralty and maritime matters.

Second, respondents' reliance on principles of prize law is misplaced, since prize jurisdiction proceeds *in rem*. *Cushing* v. *Laird*, 107 U.S. 69, 80 (1882); *Jennings* v. *Carson*, 8 U.S. (4 Cranch) 2,23 (1807). The question prize courts have to determine is that of "prize or no prize." *See also* 7 G. Hackworth, *Digest of International Law* 30 (1943).[5] The suits here are *in personam* actions against the petitioner.

It was established common law doctrine at the time of the passage of the First Judiciary Act that no personal action could be maintained against a foreign sovereign. As the Court said in *The Santissima Trin-*

---

[5] The cases cited by respondents are not to the contrary: in *Del Col* v. *Arnold*, 3 U.S. (3 Dall) 333 (1796), by agreement of the parties, a vessel taken as a prize was sold; the proceeds were paid into court; and the court adjudicated the rights of the parties to the sum of money. *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), was a libel by the former owners of a neutral vessel against the owners of an American privateer that had plundered the neutral vessel and carried off its papers. The vessel was subsequently seized by a British cruiser, detained for want of papers, and thereafter condemned as a lawful prize. Justice Story held that the district court had jurisdiction by virtue of its general admiralty and maritime jurisdiction, to hear the case against the owners of the privateer "of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals." 16 U.S. at 550.

idad, 20 U.S. (7 Wheat.) 283, 353 (1822): "a foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits."

The Court distinguished an *in rem* action in prize, saying: "prize property which a [foreign public vessel] brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from a public ship in our ports, by the express permission of our government, that does not vary the case, since it invokes no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws." 20 U.S. at 354.

Third, the suggestions that the claimed unprovoked attack on the HERCULES by aircraft of the Argentine Air Force was akin to an act of piracy and constituted a violation of an implied safe conduct border on the frivolous.

Both under international law[6] and the domestic

---

[6] *See* I. Brownlie, *Principles of Public International Law* 244 (3d ed. 1979):

> The essential feature of the definition [of piracy] is that the acts must be committed for private ends. It follows that piracy cannot be committed by warships or other government ships, or government aircraft, except where the crew "has mutinied and taken control of the ship or aircraft." (Citations omitted).

See also the 1958 Geneva Convention on the High Seas, Articles 15, 16; *Restatement (Third) Foreign Relations Law of the United States* § 522, comment *e* (1987):

> Not every act of violence committed on the high seas is piracy under international law. Only the following acts are considered piratical:
>
> (i) Any illegal acts of violence, detention, or depredation *committed for private ends* by the crew or the passengers of a private ship or a private aircraft, and directed against another ship or aircraft on the high seas, or against persons or property on board such other ship or aircraft; or against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;
>
> (ii) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; . . . (emphasis added).

law[7] of the United States, actions taken by military aircraft on the high seas, acting on government orders in the course of an armed conflict are not, and never have been, regarded as piratical acts.

B. The General Admiralty and Maritime Jurisdiction Exercised by Federal Courts Does Not Provide a Basis for Suits Against Foreign States for Claimed Violations of International Law

Section 1605(b) of the FSIA establishes a special regime for civil admiralty and maritime claims against foreign states.[8] The Act permits only *in personam*

---

[7] See 18 U.S.C. §§ 1651-1653.

[8] Section 1605(b) provides in relevant part as follows:

> (b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial

suits to enforce a maritime lien against a vessel or cargo of a foreign state, and only if the lien is based upon a commercial activity of the foreign state and if proper statutory notice is given. The FSIA thus converts the maritime lien into a personal claim against the responsible foreign state.[9]

Federal courts have uniformly interpreted and applied this provision consistently with the Congressional scheme. *See, e.g., Velidor* v. *L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), *cert. denied*, 455 U.S. 929 (1982); *Castillo* v. *Shipping Corp. of India*,

---

activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; . . . and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days. . . .

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

[9] In two limited respects the enforcement of maritime liens continues to be treated as if it were an *in rem* proceeding against the vessel: jurisdiction still depends on finding the vessel or cargo within the district where the district court sits, and recovery is limited to the value of the vessel or cargo. *See also* H.R. Rep. 94-1487 at 21-22.

606 F.Supp. 497, 502-03 (S.D.N.Y. 1985); *China Nat'l Chem. Corp.* v. *M/V Lago Haulaihue*, 504 F.Supp. 684, 689-90 (D.Md. 1981).

In enacting section 1605(b), Congress exercised its unquestioned power under the admiralty and maritime clause of Art. III of the Constitution (Sec. 2, cl. 1) to establish the substantive and procedural law to be applied by federal courts sitting in admiralty.

> The law administered by federal courts in admiralty is therefore an amalgam of the general maritime law insofar as it is acceptable to the courts, modifications of that law by congressional amendment, the common law of torts and contracts as modified to the extent constitutionally possible by state legislation, and international prize law. *This body of law is at all times subject to modification by the paramount authority of Congress acting in pursuance of its powers under the admiralty and maritime clause and the necessary and proper clause and, no doubt, the commerce clause*, now that the Court's interpretation of that clause has become so expansive. Of this power there has been uniform agreement among the Justices of the Court. (Footnotes omitted, emphasis added).

The Constitution of the United States of America, Analysis and Interpretation, S.Doc. No. 99-16, 99th Cong., 1st Sess. at 743 (1987).

Respondents, however, maintain that the district court should have disregarded the FSIA's special admiralty provision and should have exercised its general admiralty and maritime jurisdiction to hear their

claims; they say (Resp.Br. at 26) that the right of an innocent neutral at sea to be free from unprovoked attack, and to seek and receive compensation for violation of that right, "is a universally accepted rule of law." *Amicus* Maritime Law Association even goes so far as to suggest that Congress lacked power to prohibit the assertion of maritime torts against foreign states from the admiralty jurisdiction in enacting the FSIA, and that if section 1605(b) of the FSIA means what it says, it is unconstitutional (Brief *amicus curiae* by the Maritime Law Association at 13). The *amicus* avoids informing the Court that a similar constitutional challenge to the FSIA's curtailment of traditional admiralty remedies against private parties was summarily rejected by the Second Circuit in *O'Connell Machinery Co.* v. *M.V. Americana*, 734 F.2d 115 (2d Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984):

> This argument founders on several grounds. In the first place, at the time the Constitution was adopted, foreign governments played little or no role in the merchant marine. *Berizzi Brothers Co.* v. *Steamship Pesaro*, 271 U.S. 562, 573, 46 S.Ct. 611, 612, 70 L.Ed. 1088 (1926). When foreign governments began to operate ships for purposes of trade, the Supreme Court held in *Berizzi*, a seminal decision, that such ships were immune from arrest. *Id.* at 574, ... However, while the FSIA undoubtedly altered the rights of libelants as they preexisted the Act, it did not alter them as they preexisted the Constitution.
>
> In the second place, the argument that the framers of the Constitution intended to preserve inviolate all the then existing substantive maritime rights has long since been rejected by the Supreme Court. "When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in Congress to modify or supplement it as experience or changing conditions might require.' " *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21 (1934) . . . (quoting *Panama Railroad Co.* v. *Johnson*, 264 U.S. 375, 386, (1924)); . . . [further citations omitted.] Congress did no more than exercise this power when it enacted section 1605(b).

Respondents' contention that the general admiralty and maritime law as applied by federal courts grants them a remedy against the petitioner under the circumstances of this case does not, therefore, bear scrutiny.[10]

---

[10] Respondents can derive no support from language contained in a Congressional report on the 1973 version of the FSIA in regard to suits in admiralty against foreign states (Resp.Br. at 49).

The earlier version of the proposed FSIA contained no special admiralty and maritime provision. More importantly, the legislative history of the 1976 FSIA expressly states:

> The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93th Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

H.R. Rep. 94-1487 at 12.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PERMIT THE MAINTENANCE OF A TORT SUIT AGAINST A FOREIGN STATE WHERE THE ALLEGED WRONGFUL ACT OCCURRED OUTSIDE THE TERRITORIAL JURISDICTION OF THE UNITED STATES

Respondents seek to avoid the FSIA's (section 1604's) bar to suits against foreign states for torts occurring outside the United States by asserting disingenuously that the attack on the HERCULES occurred "in the United States" (Resp.Br. at 50-51). They reason that—

1) the definition section of the FSIA, 28 U.S.C. § 1603(c), defines "United States" as including all "territory and *waters*, continental and insular, *subject to the jurisdiction of the United States* (Resp.Br. at 50; respondents' emphasis);

2) since petitioner's claimed wrongful acts occurred on the high seas—an area within the acknowledged admiralty and maritime jurisdiction of federal courts—the claimed wrongful acts occurred in "waters subject to the jurisdiction of the United States";

3) therefore, "by statutory definition" (*ibid.*), the tortious attack on the HERCULES took place "in the United States."

Based on this logic, respondents urge that the district court was competent to hear their tort claims against the petitioner under Section 1605(a)(5) of the FSIA, which denies immunity to a foreign state for property losses occurring "in the United States" that are caused by the tortious acts of a foreign state.

The minor premise of respondents' syllogism is plainly invalid.

In signifying the territorial reach of the FSIA, Congress employed in section 1603(c) language customarily used to manifest the Congressional intent that the statute should be effective in places where the United States exercises sovereignty.[11] For example, the modifying phrase "continental or insular" has been repeatedly interpreted to restrict the definition of "United States" to the continental United States, and to such islands as are part of the United States or its possessions; otherwise, the modifying phrase would be surplusage. *See Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 840 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) (although the United States exercises administrative control within its embassies, embassies are not ". . . in territory . . . subject to the jurisdiction of the United States" for purposes of a tort suit under the FSIA); *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582, 588-89 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984) (same holding).

Similarly, the term "waters" in the definition section does not cover all waters that may be subject to any form of judicial or administrative jurisdiction by the United States.[12] Rather, the scope of the term

---

[11] The definition of the term "United States" in § 1603(c) of FSIA is copied almost verbatim from the Immigration and Nationality Act; 8 U.S.C. § 1185(d) reads as follows:

> The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

[12] *Perez* v. *Bahamas*, 482 F.Supp. 1208, 1300 (D.D.C. 1980), *aff'd*, 652 F.2d 186, 189 (D.C.Cir. 1981), *cert. denied*, 454 U.S. 880 (1981), is the only case where the argument was made, and

"waters . . . subject to the jurisdiction of the United States" is limited to the internal and territorial waters that are subject to the sovereignty of the United States. Without any support in the statute or in its legislative history, respondents suggest that the term "*jurisdiction of the United States*" in section 1603(c) is synonymous with "jurisdiction of United States *courts*." It plainly is not.

Moreover, Congress knows how to embrace the high seas within the reach of a jurisdictional statute if it intends to do so.[13] The established rule is that absent a clear manifestation by Congress to the contrary, statutes have only territorial effect. *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Lauritzen* v. *Larsen*,

---

rejected, that the term "waters" in the FSIA's definition section includes waters subject to the special maritime jurisdiction or the exclusive fisheries jurisdiction of the United States.

[13] *See, e.g.*, 14 U.S.C. § 89(a), empowering the Coast Guard to search and seize vessels "*upon the high seas* and waters over which the United States has jurisdiction" (emphasis added), for the prevention, detection, and suppression of violations of the laws of the United States.

The "special maritime and territorial jurisdiction of the United States" as defined in the Federal Criminal Code, 18 U.S.C. § 7, extends to United States vessels on "*[T]he high seas*, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, . . ." (para.(1)), and to any United States aircraft (para. (2)) while such aircraft is in flight over *the high seas*. . ." (emphasis added) *See also United States* v. *Holmes*, 18 U.S. (5 Wheat.) 412 (1820) (statute extends to high seas but does not cover foreign vessels).

The Anti-Smuggling Act, 19 U.S.C. § 1701, permits the President to declare portions of *the high seas* to be customs enforcement areas.

345 U.S. 571, 578 (1953); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949).

Finally, it is also worthy of note that section 1604 of the FSIA makes it clear that the immunity enjoyed by a foreign state is to be interpreted according to any international agreements "to which the United States [was] a party at the time of enacting the Act." At the time of its enactment in 1976, the United States was a party to the 1958 Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205,[14] and to the 1958 Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82,[15] both of which deny to states the right to exercise sovereignty over the high seas. There is nothing in the legislative history of the FSIA indicating that Congress intended to disregard these treaty commitments.

In consequence, there is no merit in respondents' contention that section 1605(a)(5) of the FSIA provides an alternative jurisdictional basis for these tort suits against the petitioner. As the FSIA and its legislative history make clear, section 1605(a)(5)'s tort exception to sovereign immunity applies only if the wrongful act or omission of a foreign state "occur[s]

---

[14] Art. 24 of the Convention provides that a coastal state may exercise control over an area contiguous to its territorial sea but not extending 12 miles from its coast for the purpose of preventing and punishing infringements of its customs, fiscal, immigration and sanitary regulations.

[15] Art. 1 of that Convention defines "high seas" as "all parts of the seas that are not included in the territorial sea or in the inland waters of a State." Art. 2 states in relevant part: "The high seas being open to all nations, no State may validly purport to subject any part of them to their sovereignty."

within the jurisdiction of the United States." H.R. Rep. 94-1487 at 21.

All courts construing this section have consistently held that in order for the tort exception to sovereign immunity to apply, the negligent or wrongful act that caused the injury, as well as the injury itself, must have occurred in the United States. *See Persinger* v. *Islamic Republic of Iran, supra*; *McKeel* v. *Islamic Republic of Iran, supra*; *Perez* v. *Bahamas, supra*; Brief of the United States as *amicus curiae* at 11-12, and cases there cited. In this case, the claimed wrongful acts occurred in the South Atlantic, thousands of miles from the territorial waters of the United States, and are demonstrably beyond the reach of section 1605's tort claims exception.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRUNO A. RISTAU
Counsel of Record
JOEL E. LEISING
KAPLAN RUSSIN & VECCHI
1215 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 887-0353
Attorneys for the Petitioner

September 1988.